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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 785 4

FRANK M. McKEY, TRUSTEE IN BANKRUPTCY, PETITIONER,

vs.

MAURICE PARADISE, AS TRUSTEE

No. 786 5

FRANK M. McKEY, TRUSTEE IN BANKRUPTCY, PETITIONER,

vs.

MAURICE PARADISE, AS TRUSTEE

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

4

PETITION FOR CERTIORARI FILED MARCH 4, 1936.

CERTIORARI GRANTED APRIL 6, 1936.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 785

FRANK M. McKEY, TRUSTEE IN BANKRUPTCY, PETITIONER,

vs.

MAURICE PARADISE, AS TRUSTEE

No. 786

FRANK M. McKEY, TRUSTEE IN BANKRUPTCY, PETITIONER,

vs.

MAURICE PARADISE, AS TRUSTEE

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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[fol. 1] [Caption omitted]

[fol. 2]

IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 55173

In the Matter of GRIGSBY-GRUNOW COMPANY, Bankrupt

PETITION FOR ALLOWANCE OF PREFERRED CLAIM—Filed June 29, 1934

At Chicago, in said District of Illinois, on the 26th day of June, A. D. 1934, came Maurice Paradise, as Trustee, of Chicago, County of Cook, State of Illinois, and made oath and said that he is duly authorized to make this Proof on behalf of, and for the benefit of those persons more particularly described hereafter, and says that the person against whom a Petition for Adjudication of Bankruptcy has been filed, was, at, and before the adjudication herein, and still is, justly and truly indebted to Maurice Paradise, as Trustee, for the benefit of those persons more particularly described hereafter, in the sum of Fourteen Thousand Six Hundred Seven Dollars and Fifty One Cents ($14,607.51), [fol. 3] with interest from the 12th day of August A. D. 1933 at the legal per centum per annum; that the consideration of said debt is as follows:

That on to-wit: the 4th day of February A. D. 1933, and prior thereto, the bankrupt maintained, in connection with its business, and for the benefit of its employees, an organization known as "Majestic Employees Welfare Association"; that the purpose and object of said association was to provide certain insurance and health benefits for the employees of said bankrupt; that as incidental to their employment and to obtain the benefit and advantage of the protection and insurance of said Majestic Employees Welfare Association, there was deducted from the salary or wages of each employee of the bankrupt, the sum of Twenty Five Cents (25c) per week; that upon the deduction of the said sum, the bankrupt had obligated itself by the terms and provisions

of the charter, constitution, and by-laws of said Majestic Employees Welfare Association to turn over immediately the aggregate of said deductions from the salary or wages of said employees, to the Majestic Employees Welfare Association; that said association was thereupon to invest and reinvest the moneys thus acquired and accumulated in certain sound securities more particularly specified in said constitution or by-laws of said association, to the end that the interest or other increment earned by said investments would be available for the insurance and health benefits contemplated in the organization of said association; that on or about to-wit: February 4, 1933, the bankrupt deducted certain large sums of money from the wages or salaries of its employees; that said bankrupt, in violation and breach of its bounden duty in the premises, failed, neglected, or refused to turn over said sum to the said Majestic Employees Welfare Association, but retained the said money for its own use and benefit; that thereafter, the said bankrupt continued until on or about to-wit: August 12, 1933, to make weekly deductions from the salary or wages of its employees so that on said last named date, to-wit: August 12, 1933; the bankrupt had deducted from the wages or salary of its employees, an aggregate sum of Fourteen Thousand Six Hundred Seven Dollars and Fifty One Cents ($14,607.51) all of which sum it failed, neglected or refused to turn over in accordance with is bounden duty so to do, to the Majestic Employees Welfare Association, but retained said sum and all of it for its own use and benefit; that none of said sum of Fourteen Thousand Six Hundred Seven Dol-
[fol. 4] lars and Fifty One Cents ($14,607.51) nor any part of it was turned over to the Majestic Employees Welfare Association but, on the contrary, the said bankrupt tortiously and wrongfully and fraudulently retained the said sum and all of it in its own possession and control; that on or about to-wit: August 12, 1933, the said Majestic Employees Welfare Association was dissolved and disbanded, and by apt resolution of the Board of Directors of the said association, the assets of said association were duly transferred and assigned to an organization prior thereto duly organized, commonly known as the "Works Council";

That said Works Council was an unincorporated organization, the membership of which was composed of duly elected representatives of the management of the bankrupt

and of the employees; that said Works Council, under its charter and by-laws, conferred certain recreational and social benefits upon the employees of the bankrupt;

That the assets of said association consisted in part of high grade securities of a face value of approximately Eighteen Thousand Dollars ($18,000.00), Three Thousand Dollars ($3,000.00) in cash and a sum of Fourteen Thousand Six Hundred Seven Dollars and Fifty One Cents ($14,607.51) due and owing from the bankrupt;

That said securities were thereafter liquidated by said Works Council and, by apt resolution, the proceeds thereof together with the aforementioned sum of approximately Three Thousand Dollars ($3,000.00) in cash, were prorated and distributed among the employees of the bankrupt;

That, notwithstanding the fact that the officers and representatives of said Works Council had made numerous requests and demands on said bankrupt to turn over the said sum of Fourteen Thousand Six Hundred Seven Dollars and Fifty One Cents ($14,607.51), the bankrupt, while acknowledging and admitting its obligation and liability on that behalf, failed so to do so that the said sum of Fourteen Thousand Six Hundred Seven Dollars and Fifty One Cents ($14,607.51) was not available for proration and distribution to the employees rightfully entitled thereto;

That said sum of Fourteen Thousand Six Hundred Seven Dollars and Fifty One Cents ($14,607.51) appears as an indebtedness of the bankrupt on the books and records of said bankrupt as due and owing to the Majestic Employees Welfare Association; that said bankrupt has, at all times, admitted and acknowledged said indebtedness due, and has, at all times, acknowledged, assented to, and accepted the [fol. 5] assignment of said sum from the Majestic Employees Welfare Association to the Works Council as hereinabove described;

That the beneficiaries of said fund are all former employees of the bankrupt; that said beneficiaries are very numerous, totalling approximately three thousand (3,000); that your Petitioner prays to be excused from setting forth in this Petition, the names of each of said beneficiaries, but is ready, upon the hearing of this cause, to produce a complete list of said beneficiaries;

That on to-wit: the 24th day of November A. D. 1933, Receivers in Equity were appointed for said bankrupt; that

thereafter duly authorized representatives of said Works Council requested said Receivers to turn over to said Works Council the sum of Fourteen Thousand Six Hundred Seven Dollars and Fifty One Cents ($14,607.51), but said request was not granted;

That on or about the 22nd day of February A. D. 1934, the following resolution was unanimously adopted by the members of said Works Council:

"The amount due the Majestic Works Council for their administration for the benefit of employees whom they represent, said fund being the property of the Works Council as successor to the Majestic Employees Welfare Asociation is $14,607.51, as indicated on the statement of the Treasurer, which is hereby approved.

Therefore it is hereby resolved that we as elected representatives of Majestic employees, totalling approximately 3,000 on August 5, 1933, the date of the creation of this Council as successor to the Majestic Employees Welfare Association, elect and appoint Mr. M. E. Paradise, our Chairman, as sole trustee of the Benefit Fund totalling $14,607.51, and hereby authorize him to bend every effort, with the aid of such legal counsel as he may require, and subject to such expenses of court or legal counsel as he may approve, to collect said sum due this Council by Grigsby-Grunow Company, and as entered on claim for said amount submitted to Equity Receivers of Grigsby-Grunow Company, Thomas L. Marshall and LeRoi J. Williams.

It is further resolved that as quickly as our Trustee Mr. Paradise, can collect said fund that the total amount resulting from this claim against Grigsby-Grunow Company, less such amount as may be authorized by the Trustee for expense incurred in this collection, shall be pro-rated [fol. 6] equally to all employees of Grigsby-Grunow Company as of August 5, 1933."

That pursuant to said resolution, this Petitioner, Maurice Paradise, prays leave as Trustee for the benefit of said employees of the bankrupt, to file this, his Petition, for a Preferred Claim against the Estate of the said bankrupt, and further asks that said claim in the sum of Fourteen Thousand Six Hundred Seven Dollars and Fifty One Cents ($14,607.51) be allowed as a Preferred Claim against the Bankrupt Estate herein;

That there are no set-offs or counter-claims to the same and that this Petitioner has not, nor has any person by his

order or to his knowledge and belief, had or received any manner of security for said debt whatever.

Maurice Paradise, Trustee.

Subscribed and sworn to before me this 27th day of June, A. D. 1934. Katherine Kelly, Notary Public.

IN THE DISTRICT COURT OF THE UNITED STATES

* * * (Caption—55173) * * *

POWER OF ATTORNEY

To Stanford Clinton, 134 N. LaSalle Street, Chicago, Illinois:

I, Maurice Paradise, as Trustee, of the City of Chicago, County of Cook, and State of Illinois, do hereby authorize you to attend the meetings of creditors of the bankrupt aforesaid at a court of bankruptcy, wherever advertised or directed to be holden, on the day and at the hour appointed and notified by said court in said matter, or at such other place and time as may be appointed by the court for holding such meeting or meetings, or at which such meeting or meetings, or any adjournment or adjournments thereof may be held, and then and there from time to time, and as often as there may be occasion, for me and in my name to vote for or against any proposal or resolution that may be then submitted under the acts of Congress relating to bankruptcy; and in the choice of trustee or trustees of the estate of the said bankrupt, and for me to assent to such [fol. 7] appointment of trustee; and with like powers to attend and vote at any other meeting or meetings of creditors, or sitting or sittings of the court, which may be held therein for any of the purposes aforesaid; also to accept any composition proposed by said bankrupt in satisfaction of his debts, and to receive payment of dividends and of money due me under any composition, and for any other purpose in my interest whatsoever, with full power of substitution.

In Witness Whereof, I have caused these presents to be signed this 27th day of June A. D. 1934.

Maurice Paradise, Trustee.

Subscribed and sworn to before me this 27th day of June A. D. 1934. Katherine Kelly, Notary Public.

IN UNITED STATES DISTRICT COURT

* * * (Caption—55173) * * *

ANSWER OF FRANK M. McKEY, TRUSTEE TO THE PETITION OF MAURICE PARADISE FOR ALLOWANCE OF PREFERRED CLAIM IN THE SUM OF $14,607.51—Filed July 27, 1934

To the Honorable Edmund D. Adcock, Referee in Bankruptcy:

Now comes Frank M. McKey, the duly elected, qualified and acting Trustee in Bankruptcy of Grigsby-Grunow Company, a corporation, the bankrupt herein, and for answer to the petition of Maurice Paradise, says as follows:

Your trustee admits that on to-wit: the 4th day of February, 1933, and prior thereto the Grigsby-Grunow Company, a corporation, maintained in connection with its business and for the benefit of its employees an organization known as "Majestic Employees Welfare Association"; that the purpose and object of said Association was to provide certain insurance and health benefits for the employees of [fol. 8] said Grigsby-Grunow Company and that to obtain the benefit and advantage of the protection and insurance of said Majestic Employees Welfare Association there was deducted from the salary or wages of each employee of the Grigsby-Grunow Company, a corporation, the sum of $.25 per week.

Your trustee for further answer is without information and, therefore, neither admits nor denies that upon the deduction of said sum, the Grigsby-Grunow Company, a corporation, had obligated itself by the terms and provisions of the charter, constitution and by-laws of said Majestic Employees Welfare Association to turn over immediately the aggregate of said deductions from the salary or wages of said employees to the Majestic Employees Welfare Association, but states upon information and belief that the amount so deducted by the Grigsby-Grunow Company, a corporation, from the salary or wages of said employees was credited on its books of account to the account of the Majestic Employees Welfare Association and that periodical payments were made from time to time by the Grigsby-Grunow Company, a corporation, to the Majestic Employees Welfare Association to cover said collections, less

any expenses incurred by the Association that were paid for by the Grigsby-Grunow Company, a corporation.

Your trustee for further answer is without information and, therefore, neither admits nor denies that said Association was thereupon to invest and reinvest the moneys thus acquired and accumulated in certain sound securities, more specifically specified in said constitution and by-laws of said Association, to the end that the interest or other increment earned by said investments would be available for the insurance and health benefits contemplated in the organization of said Association, but prays that the petitioner be required to make strict proof thereof.

Your trustee for further answer denies that on or about to-wit: February 4, 1933 the Grigsby-Grunow Company, a corporation, deducted certain large sume of money from the wages or salaries of its employees and denies that the Grigsby-Grunow Company, a corporation, in violation and breach of its alleged bounded duty in the premises failed, neglected or refused to turn over said sum to the said Majestic Employees Welfare Association and denies that it retained the said moneys for its own use and benefit.

Your trustee for further answer admits that from April 22, 1933 to and including August 12, 1933 the Grigsby- [fol. 9] Grunow Company, a corporation, deducted from the salaries or wages of its employees who were members of said Majestic Employees Welfare Association the sum of $14,756.42 and for the period commencing February 4, 1933 and expiring November 4, 1933, the Grigsby-Grunow Company, a corporation, expended on behalf of said Majestic Employees Welfare Association the net sum of $148.91 and the amounts so deducted from the salaries or wages of said employees, less the amount of the charges, were credited upon the books and records of the bankrupt corporation to the account of the Majestic Employees Welfare Association.

Your trustee for further answer denies that the Grigsby-Grunow Company, a corporation retained the said sum of $14,607.51 for its own use and benefit but states the fact to be that no fund ever existed or any segregation was made of the same but that the said balance of $14,607.51 was merely a bookkeeping computation which was arrived at by deducting the said sum from the amounts due to its

employees and crediting the same upon its books to the credit of the Majestic Employees Welfare Association.

Your trustee for further answer admits that the Grigsby-Grunow Company, a corporation, never paid or turned over to the Majestic Employees Welfare Association the amount of $14,607.51 or any part thereof, but denies that the Grigsby-Grunow Company, a corporation, tortiously, wrongfully and fraudulently retained said amount in its own possession and control.

Your trustee for further answer admits that on or about to-wit: August 12, 1933 the said Majestic Employees Welfare Association was dissolved and disbanded but is without information and, therefore, neither admits nor denies that by apt resolution of the Board of Directors of said Association the assets of said Association were duly transferred and assigned to an organization prior thereto duly organized, commonly known as the "Works Council" but prays that the petitioner be required to make strict proof thereof.

Your trustee for further answer admits that the Works Council was an unincorporated organization, the membership of which was composed of duly elected representatives of the management of the Grigsby-Grunow Company, a corporation, and of its employees and that said Works Council under its charter and by-laws conferred certain recreational and social benefits upon the employees of the Grigsby-Grunow Company, a corporation.

[fol. 10] Your trustee for further answer is without information and, therefore, neither admits nor denies that the assets of said Association consisted in part of high grade securities of a face value of approximately $18,000.00, $3,000.00 in cash and a claim against the Grigsby-Grunow Company, a corporation, of $14,607.50, which was due and owing from the Grigsby-Grunow Company, a corporation, to said Majestic Employees Welfare Association.

Your trustee for further answer is without information and, therefore, neither admits nor denies that said securities were thereafter liquidated by said Works Council and by apt resolution, the proceeds thereof, together with the aforementioned sum of approximately $3000.00, were prorated and distributed among the employees of the Grigsby-Grunow Company, a corporation, but prays that the petitioner be required to make strict proof thereof.

Your trustee for further answer is without information and, therefore, neither admits nor denies that the officers and representatives of said Works Council had made numerous requests and demands on said Grigsby-Grunow Company, a corporation, to turn over the said sum of $14,607.51 as alleged in said petition but prays that the petitioner be required to make strict proof thereof.

Your trustee for further answer admits that the said sum of $14,607.51 appears as an indebtedness of the Grigsby-Grunow Company, a corporation, on its books and records, as due and owing to the Majestic Employees Welfare Association but is without information and, therefore, neither admits nor denies that said Grigsby-Grunow Company, a corporation, has at all times admitted and acknowledged said indebtedness due, and has at all times acknowledged, assented to, and accepted the assignment of said sum from the Majestic Employees Welfare Association to the Works Council but prays that the petitioner be required to make strict proof thereof.

Your trustee for further answer is without information and, therefore, neither admits nor denies that the beneficiaries of said Majestic Employees Welfare Association are all former employees of Grigsby-Grunow Company, a corporation; are very numerous, totaling approximately 3000, but prays that the petitioner be required to make strict proof thereof.

Your trustee for further answer is without information and, therefore, neither admits nor denies that the duly authorized representatives of said Works Council re- [fol. 11] quested the equity receivers of the Grigsby-Grunow Company, a corporation, to turn over to it the sum of $14,607.51 and that said request was not granted, but prays that the petitioner be required to make strict proof thereof.

Your trustee is without information and, therefore, neither admits nor denies that on or about the 22nd day of February, 1934 the resolution as set forth in said petition was unanimously adopted by members of the Works Council, but prays that the petitioner be required to make strict proof thereof.

Your trustee for further answer alleges that nothing in said petition contained is sufficient under the terms and provisions of the Bankruptcy Act to establish the right in said petitioner to a preferred claim against this estate, but on the contrary, and if the petitioner is legally entitled

to prove a claim in this estate, that the same would be in the nature of a general claim and one not entitled to priority of payment.

Your trustee for further answer alleges that the claim of said petitioner as set forth in his said petition does not come within any of the provisions of the Bankruptcy Act and particularly Section 64 thereof and is, therefore, one not entitled to priority of payment.

Your trustee having fully answered said petition prays that the petition of Maurice Paradise filed in this cause on the 29th day of June, A. D. 1934, be dismissed or in lieu thereof that said petition should be allowed to stand as a general unsecured claim against this estate.

Frank M. McKey, Trustee.

Duly sworn to by Frank M. McKey. Jurat omitted in printing.

[fol. 12] In United States District Court

• • • (Caption—55173) • • •

Stipulation of Facts—Filed October 16, 1934.

It Is Hereby Stipulated and Agreed by and between Frank M. McKey, as Trustee of the bankrupt estate of Grigsby-Grunow, Inc., and Maurice Paradise, as Trustee, petitioner herein, by their respective counsel, that the facts relevant to the petition filed herein on behalf of said Maurice Paradise, as Trustee, are as follows:

On February 4, 1933 and prior thereto, the bankrupt maintained in connection with its business, an unincorporated organization known as the "Majestic Employees Welfare Association, which had been formerly known as the "Majestic Employees Welfare and Athletic League." The Association's purpose was to provide life, health and accident insurance for the benefit of the employees of the bankrupt and their dependents. The Association was governed by its own officers and directorate and maintained its own account in the First National Bank of Chicago. The funds of the Association were invested exclusively in obligations of the United States Government and the earnings and increment of these investments were used for the insurance benefits contemplated by the Association's constitution and by-laws.

The membership of the Association was comprised exclusively of employees who had been employed for thirty days or more and who had paid the initial fee of $1.00 to the treasury of the Association. The initial fee was automatically deducted by the bankrupt from the amount due as salary or wages of each employee, employed for the required period. In addition to the initial fee there were weekly dues of 25c per week, which were likewise automatically deducted by the bankrupt from the amount due each member as salary or wages.

Prior to February 4, 193-, the bankrupt regularly paid the Association by check which was deposited in its treasury, the accumulations of each payroll deduction, less de- [fol. 13] ductions for expenses of the Association paid by the bankrupt. Commencing with February 4, 1933, however, the bankrupt began to fall in arrears, and from that time until November 24, 1933, when the Receivers in Equity were appointed for the bankrupt, there was always a balance to the credit of the Association, which it had not paid to the Association. On November 24, 1933 said balance was in the sum of $14,607.51. The deductions of 25c per week, including deduction for the initial fee, were made by charging the employee's account on the payroll records of the bankrupt and crediting the aggregate of all such deductions to the account of the Majestic Employees Welfare Association on the books of the bankrupt. No actual money was taken from the pay envelopes of the employees and deposited in any account of the bankrupt, but to the contrary the matter was handled as a mere bookkeeping entry and at no time did the Grigsby-Grunow Company segregate any money due the Majestic Employees Welfare Association or deposit any money in any separate trust account or bank account.

On or about August 12, 193-, the Majestic Employees Welfare Association was formally dissolved and disbanded. At the time of the dissolution the Association had the following assets:

Cash (including moneys due from Grigsby-Grunow, Inc.)	$19,607.51
United States Government Bonds	18,000.00
Total	$37,607.51

After setting up a fund of some $2,750.00 to cover certain contingent obligations of the Association, all the other

assets were conveyed, by apt resolution, to the Majestic Works Council. The Works Council, like the Association, was an unincorporated organization in which the bankrupt and its employees had equal representation. All employees of the bankrupt were members of the Works Council. The Works Council had for its objective harmonious relations between the bankrupt and its employees and conferred numerous benefits upon the employees.

On December 19, 1933, the Board of Directors of the Works Council adopted a resolution to disburse some $20,000.00 of the moneys which had been assigned to the Council by the Association. In accordance with this resolution, the moneys were thereafter disbursed pro ratably to the [fol. 14] employees. A claim was filed in the equity receivership case by Maurice Paradise, as Trustee, the petitioner herein, for the payment of the $14,607.51 to the Works Council. However, the moneys were never paid.

On February 22, 1934, the following resolution was adopted by the Works Council:

"The amount due the Majestic Works Council for their administration for the benefit of employees whom they represent, said fund being the property of the Works Council, as successor to the Majestic Employees Welfare Association, is $14,607.51, as indicated on the statement of the Treasurer, which is hereby approved;

"Therefore, it is hereby resolved that we, as elected representatives of Majestic employees, totalling approximately 3,000 on August 5, 1933, the date of the creation of this Council as successor to the Majestic Employees Welfare Association, elect and appoint Mr. M. E. Paradise, our Chairman, as sole trustee of the Benefit Fund totalling $14,607.51, and hereby authorize him to bend every effort, with the aid of such legal counsel as he may require, and subject to such expenses of court or legal counsel as he may approve, to collect said sum due this Council by Grigsby-Grunow Company, and as entered on claim for said amount submitted to Equity Receivers of Grigsby-Grunow Company, Thomas L. Marshall and Le Roi J. Williams.

"It is further resolved that as quickly as our Trustee, Mr. Paradise, can collect said fund, that the total amount resulting from this claim against Grigsby-Grunow Company, less such amount as may be authorized by the Trustee for expense incurred in this collection, shall be pro rated equally to all employees of Grigsby-Grunow Company as of August 5, 1933."

In conformity with this direction and authorization, this proceeding was instituted. Subsequent to February 4, 1933, when the Company began to fall in arrears, Maurice Paradise, petitioner herein, who was the Manager of the Majestic Employees Welfare Association and Chairman of the Board of the Works Council, on several occasions spoke to LeRoi J. Williams, Vice-President and General Manager of the bankrupt, and to M. D. Harrison, Treasurer of the Company, and requested the payment of the sums which the bankrupt was obligated to pay over to the Association. However, Mr. Paradise was unsuccessful in straightening the matter out. On one occasion the request for payment of the money, as evidenced by a voucher, was forwarded to [fol. 15] the Treasurer's office for signature and the same was returned unsigned. It appears that Mr. Paradise also requested payment from the Equity Receivers and payment was refused.

The practice of the bankrupt was to deposit all of its incoming revenue in its general bank account, from which it would from time to time withdraw moneys and establish various special accounts. The bankrupt was accustomed to withdraw from its general account or special accounts as the convenience of the situation required, and the payroll was drawn from the various accounts, both general and special, indiscriminately.

On November 24, 1933, the bank balances of the bankrupt were as follows:

	Bank Balance	Checks Outstanding	Book Balance
Continental Illinois National Bank and Trust Company—General Account Used for accounts payable disbursements	$91,016.18	$51,631.70	$39,384.48
Continental Illinois National Bank and Trust Company—Special Account Used for office payroll	9,613.16	6,554.26	3,058.90
Harris Trust and Savings Bank Used for temporary payroll and traveling expense disbursements	10,399.66	2,478.58	7,921.08
Bank of Montreal—Canada Deposit account only	256.62	.....	256.62
Pioneer Trust and Savings Bank—General Account Accommodation deposit account	1,005.30	.....	1,005.30
Pioneer Trust and Savings Bank—Payroll Account Used for factory payroll	620.40	.....	620.40
First National Bank—Payroll Account Used for factory payroll	927.52	6.62	920.90
First National Bank—Regular Account Accommodation deposit account	7,031.85	.....	7,031.85
American National Bank	.69	.....	.69

On May 20, 1933, the general account of the bankrupt in the Continental Illinois National Bank and Trust Company of Chicago showed a balance in the sum of $6,071.53, and on September 23, 1934, the balance was $4,305.30. However, at all times from February 4, 1933 to November 24, 1933, there were sufficient moneys in the various accounts to cover the amount of the claim.

A. L. Schapiro, Attorneys for the Trustee in Bankruptcy. Pritzker & Pritzker, Attorneys for Maurice Paradice, as Trustee, Petitioner. Of Counsel: —— ——.

[fol. 16] In United States District Court

• • • (Caption—55173) • • •

Order Authorizing Trustee to Pay Preferential Lien etc.—Entered December 14, 1934.

This cause coming on to be heard upon the petition of Maurice Paradise, as Trustee, for the allowance of a preferential claim against the estate of the bankrupt, and the answer to said petition filed by the Trustee in Bankruptcy; and the court having heard evidence with reference to said petition; and the parties having heretofore entered into a formal stipulation of facts relevant to said petition; and the court having heard the arguments of counsel and read the briefs filed by the respective parties hereto, and being now fully advised in the premises,

The Court Finds as Follows:

(1) The court has jurisdiction of the parties and of the subject matter and jurisdiction to determine this suit.

(2) The accumulated deductions from the wages and salaries of the employees of the bankrupt in sum of $14,607.51, constituted a trust fund in the hands of the bankrupt.

(3) The retention by the bankrupt of the accumulated deductions from the wages and salaries of its employees was tortious and constituted a conversion.

(4) The assets of the bankrupt in the hands of the Trustee in Bankruptcy were augmented and increased to the extent and in the amount of the trust fund.

(5) The trust fund, while co-mingled with the individual funds of the bankrupt, can be sufficiently identified to impress a trust and preferential lien upon all moneys in the bankrupt's bank accounts. Title to the trust fund did not pass to the Trustee in Bankruptcy and may be reclaimed by the beneficiaries or their duly authorized representative.

(6) Maurice Paradise, in the capacity of Trustee, is entitled to recover the full amount of the trust fund.

It Is Therefore Ordered that the petition of Maurice Paradise, as Trustee, for the allowance of a preferential lien against the assets of the bankrupt estate of Grigsby-Grunow, Inc., in the sum of $14,607.51, be and the same is hereby allowed, and It Is Further Ordered that the Trustee [fol. 17] in Bankruptcy pay over to said Maurice Paradise, as Trustee, the said sum of $14,607.51, said payment to be made forthwith.

Enter:

Edmund D. Adcock, Referee in Bankruptcy.

December 14, 1934.

Referee's certificate to foregoing paper omitted in printing.

[fol. 18] IN UNITED STATES DISTRICT COURT

* * * (Caption—55173) * * *

CERTIFICATE OF EDMUND D. ADCOCK, REFEREE IN BANKRUPTCY, PURSUANT TO PETITION FILED BY FRANK McKEY, TRUSTEE IN BANKRUPTCY, TO REVIEW ORDER OF REFEREE ENTERED ON DECEMBER 14, 1934.—Filed January 30, 1935.

To the Honorable John P. Barnes, Judge of the District Court of the United States for the Northern District of Illinois, Eastern Division.

Honorable Sir:

Preliminary Statement

This is an involuntary petition in bankruptcy filed February 17, 1934.

June 29, 1934, Maurice Paradise, as Trustee for the benefit of "Majestic Employees Welfare Association," filed his petition, claiming that he was entitled to the payment of $14,607.51 in cash out of the funds in the possession of the Trustee herein and claiming that said fund constituted a trust which came into the custody of said Trustee and in equity belonged to said Majestic Employees Welfare Association.

An answer was filed by the Trustee on July 27, 1934, denying that petitioner is entitled to any relief.

Question Involved

The sole question involved is whether the petitioner has a valid prior claim upon the trust fund theory to the fund amounting to $14,607.51 and whether he has traced and identified said fund in the continuous possession of Grigsby-Grunow Company up to the time of bankruptcy and the subsequent receipt by the receiver and trustee herein of said fund.

Summary of the Evidence

A summary of the evidence is set forth in the findings of the order complained of and it is unnecessary here to repeat them.

[fol. 19]

Order Complained Of

The order entered December 14, 1934, upon the evidence above mentioned and complained of here, is set forth in the petition for review and it is unnecessary to here again set it forth, as the petition for review is transmitted herewith.

Documents Transmitted

I am transmitting herewith the following:

1. Petition of Maurice Paradise as Trustee, filed June 29, 1934.
2. Answer of Frank M. McKey, Trustee, filed July 27, 1934.
3. Stipulation of facts filed October 16, 1934.
4. Brief and argument of Trustee in Bankruptcy, filed October 16, 1934.
5. Brief and argument of petition, filed October 16, 1934.
6. Notice of petitioner filed December 14, 1934.

7. Findings of fact and conclusions of law submitted by petitioner and filed December 14, 1934.

8. Notice of motion for leave to file petition for review, filed December 22, 1934.

9. Petition to review Referee's order, filed December 22, 1934.

10. Exhibits referred to in stipulation of facts.

Respectfully submitted. Edmund D. Adcock, Referee in Bankruptcy.

Dated, Chicago, January 29, 1935.

[fol. 20] IN UNITED STATES DISTRICT COURT

* * * (Caption—55173) * * *

MEMORANDUM—Filed March 28, 1935

This matter came on to be heard upon a petition to review an order of the Referee entered on December 14, 1934, wherein he allowed a claim of one Maurice Paradise, as trustee, as a preferred claim.

The court, with considerable reluctance, because his sympathies are with the claimant, has come to a conclusion other than and different from that of the Referee.

The court is of the opinion, first, that there was no trust, and, second, that even if there was a trust, the trust funds have not been traced into the hands of the trustee in bankruptcy.

Accordingly, the prayer of the petition for review will be granted and the order of the Referee of December 14, 1934, will be reversed, and an order to that effect has this day been made.

Barnes, Judge.

March 28, 1935.

IN UNITED STATES DISTRICT COURT

* * * (Caption—55173) * * *

ORDER OR DECREE—Entered March 28, 1935

This matter, having come on to be heard upon the petition for a review of the order of the Referee entered De-

cember 14, 1934, and the court, having considered the arguments and being now fully advised in the premises,

It Is Ordered that the prayer of said petition for review be granted and that said order of the Referee of December [fol. 21] 14, 1934, be, and it is hereby, reversed; and the Referee is ordered and directed to allow the claim of the claimant as a general claim against the bankrupt estate.

Enter:

Barnes, Judge.

In United States District Court

* * * * (Caption—55173) * * *

Assignment of Errors—Filed April 26, 1935

The petitioner, Maurice Paradise, in connection with and in support of his application for leave to appeal the order disallowing his claim as a preferential lien and allowing said claim as a general claim against the bankrupt estate, makes the following assignment of errors:

(1) The court erred in finding as a matter of law that there was no trust relationship between the bankrupt estate and the employees of the bankrupt, represented in this cause by the petitioner, as Trustee.

(2) The court erred in finding as a matter of law that even if there was a trust relationship between the bankrupt and its employees, the trust funds had not been traced into the hands of the Trustee in Bankruptcy.

(3) The court erred in reversing the order of the Referee of December 14, 1934.

Wherefore the petitioner prays that said order of the District Court entered on March 28, 1935, be reversed and that the order of the Referee of December 14, 1934 be affirmed.

Maurice Paradise, As Trustee.

[fol. 22] In United States District Court

* * * (Caption—55173) * * *

Order Allowing Appeal—Entered April 26, 1935

This cause coming on to be heard upon the petition of Maurice Paradise, as Trustee, for leave to appeal the order

entered by this court on March 28, 1935, together with the assignment of errors in support of said application; and the court being now fully advised in the premises,

It Is Hereby Ordered that leave is granted to Maurice Paradise, as Trustee to appeal the order entered by this court on March 28, 1935, to the United States Circuit Court of Appeals for the Seventh Circuit upon the filing of a cost bond in the sum of $250.00. To the entry of the foregoing order the Trustee in Bankruptcy objects and excepts.

Enter:

Barnes, Judge.

In United States District Court

* * * (Caption—55173) * * *

Stipulation Waiving Citation—Filed April 27, 1935

It Is Hereby Stipulated and Agreed by and between the parties hereto, through their respective attorneys, that Frank M. McKey, Trustee in Bankruptcy, waives the issuance and service of a citation in connection with the appeal of Maurice Paradise, as Trustee, from the order entered in [fol. 23] this court on March 28, 1935, and further waives the filing of proof of service of said citation.

It Is Further Stipulated that said appeal shall be prosecuted as though a citation had duly issued out of this court and due service of the same had been made on Frank M. McKey, Trustee in Bankruptcy, and due proof of the service of said citation had been filed herein.

A. L. Schapiro, Attorney for Frank M. McKey, Trustee in Bankruptcy. Pritzker & Pritzker, Attorneys for Maurice Paradise, As Trustee.

Approved: —— ——, Judge.

Date: —— — ——.

In United States District Court

* * * (Caption—55173) * * *

Stipulation in Lieu of Præcipe—Filed April 26, 1935

It Is Hereby Stipulated and Agreed that the following pleadings and papers shall be printed and that the case may be heard on the records as thus constituted:

(1) The petition of Maurice Paradise for a preferential lien.
(2) Answer of Frank M. McKey, Trustee in Bankruptcy.
(3) Stipulation of Facts.
(4) Memoranda opinion of the Referee.
(5) Order of Referee granting preferential lien.
(6) Referee's certificate pursuant to Petition for Review.
(7) Memoranda of the District Judge.
(8) Order of the District Judge reversing the findings of the Referee.
(9) Assignment of Errors.
[fol. 24] (10) Order of the District Judge granting leave to appeal to the United States Circuit Court of Appeals for the Seventh Circuit.

A. L. Schapiro, Attorney for Frank M. McKey, Trustee in Bankruptcy. Pritzker & Pritzker, Attorneys for Maurice Paradise, As Trustee.

Approved: —— ——, United States District Judge.

Date: —— — ——.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 25] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

C. C. A. No. 5498

In the Matter of GRIGSBY-GRUNOW, INC., Bankrupt

In re Petition of MAURICE PARADISE, as Trustee, for a Preferential Lien Against the Assets of the Bankrupt Estate

PETITION FOR APPEAL TO THE CIRCUIT COURT OF APPEALS—Filed April 27, 1935

To the Honorable The Judges of the United States Circuit Court of Appeals of the First Circuit:

Your Petitioner, Maurice Paradise, as Trustee, being aggrieved by a certain order entered in the above entitled proceeding on the 28th day of March, A. D. 1935, in the

District Court for the Northern District of Illinois, Eastern Division, reversing the order of the Referee allowing the claim of the Petitioner for a Preferential Lien against the assets of the bankrupt estate and directing that said claim be allowed as a general claim, does hereby petition for an appeal to the United States Circuit Court of Appeals for the Seventh Circuit.

Maurice Paradise, As Trustee.

[File endorsement omitted.]

[fol. 26] IN UNITED STATES CIRCUIT COURT OF APPEALS

* * * (Caption—5498) * * *

ASSIGNMENT OF ERRORS—Filed April 27, 1935

The Petitioner, Maurice Paradise, in connection with and in support of his application for leave to appeal the order disallowing his claim as a Preferential Lien and allowing said claim as a general claim against the bankrupt estate, makes the following assignment of errors:

(1) The court erred in finding as a matter of law that there was no trust relationship between the bankrupt estate and the employees of the bankrupt, represented in this cause by the Petitioner, as Trustee.

(2) The court erred in finding as a matter of law that even if there was a trust relationship between the bankrupt and its employees, the trust funds had not been traced into the hands of the Trustee in Bankruptcy.

(3) The court erred in reversing the order of the Referee of December 14, 1934.

Wherefore the petitioner prays that said order of the District Court entered on March 28, 1935, be reversed and that the order of the Referee of December 14, 1934 be affirmed.

Maurice Paradise, As Trustee.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

* * * (Caption—5498) * * *

ORDER GRANTING LEAVE TO APPEAL—Filed April 27, 1935

This cause coming on to be heard on the petition of Maurice Paradise, as Trustee, to appeal from an order entered in the United States District Court for the Northern District of Illinois, Eastern Division, on the 28th day of March, 1935; and the court having considered the state-
[fol. 27] ment of the issues and the Assignment of Errors; and the court being now fully advised in the premises.

It Is Ordered that leave be and is hereby granted said Maurice Paradise, as Trustee, to prosecute an appeal to this court from the order entered on March 28, 1935 by the United States District Court for the Northern District of Illinois, Eastern Division, in the cause entitled "In the Matter of Grigsby-Grunow, Inc., Bankrupt," bearing case No. 55173.

Enter:

William M. Sparks, Judge of the United States Circuit Court of Appeals, Seventh Circuit.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

* * * (Caption—5498) * * *

ORDER CONSOLIDATING CAUSES, ETC.—Filed April 30, 1935

This cause coming on to be heard on the petition of Maurice Paradise, as Trustee, Petitioner-Appellant herein, to consolidate this cause with the cause bearing Case No. 5499, and

It appearing to the court that both of said causes are identical in parties, subject matter and the relief sought and the court having considered the stipulation of the parties that said causes be consolidated, and

It further appearing to the court that it will greatly simplify and expedite the disposition of said causes to enter an order of consolidation, and the court now being fully advised in the premises,

It Is Hereby Ordered that this cause be and it is hereby [fol. 28] consolidated with Cause No. 5499; that said causes, as consolidated, shall proceed as though they were one and the same appeal and all papers and documents heretofore filed in either of said causes shall be deemed to have been filed in each of said causes, and

It Is Further Ordered that all orders, findings or judgments of this court entered in said consolidated causes shall be binding upon the parties as though said orders, findings or judgments were separately entered in each of said causes.

[File endorsement omitted.]

[fols. 29 & 30] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 31] [Caption omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT

In the Matter of GRIGSBY-GRUNOW, INC., Bankrupt

5498

MAURICE PARADISE, as Trustee,

vs.

FRANK M. McKEY, Trustee in Bankruptcy

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

In the Matter of GRIGSBY-GRUNOW, INC., Bankrupt

5499

MAURICE PARADISE, as Trustee

vs.

FRANK M. McKEY, Trustee in Bankruptcy

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

MEMO RE PETITION FOR APPEAL

And afterwards, to-wit: On the twenty-seventh day of April, 1935, there was filed in the office of the Clerk of this

court, in cause No. 5498, a Petition for Leave to Appeal, which said Petition is not copied here, as the same appears on page 25 of the printed record in this cause, certified herewith.

MEMO RE ASSIGNMENTS OF ERROR

And on the same day, to-wit: On the twenty-seventh day of April, 1935, there was filed in the office of the Clerk of this court, in cause No. 5498, an Assignment of Errors, which said Assignment of Errors is not copied here, as the same appears on page 26 of the printed record in this cause, certified herewith.

[fol. 32] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 5498

[Title omitted]

STATEMENT OF ISSUES—Filed April 27, 1935

The Petitioner, Maurice Paradise, as Trustee, for the benefit of approximately three thousand (3,000) former employees of the bankrupt, filed his petition asking for a Preferential Lien against the bankrupt estate. The matter was heard upon a Stipulation of Facts.

The bankrupt had entered into an agreement with its employees whereby it deducted twenty-five cents (25c) for a week from the pay roll or salary of each employee and undertook to remit the accumulated deductions to the Majestic Employees Welfare Association. The monies thus remitted were to be invested in obligations of the United States Government and the income derived therefrom were to provide health, accident and life insurance benefits for the employees of the bankrupt.

The bankrupt had failed to turn over the sum of Fourteen Thousand Six Hundred Seven Dollars and Fifty-one Cents ($14,607.51) of the monies it had deducted from the salaries and wages due its employees in accordance with its agreement.

The Petitioner claims that he has a Preferential Lien against the assets of the bankrupt in that amount. The

Trustee in Bankruptcy contends that there was no trust relationship between the bankrupt and its employees and that even assuming the existence of such a trust relationship, it is impossible for the petitioner to sufficiently identify and trace the funds.

The Referee, after hearing the matter, entered an order [fol. 33] allowing the Petitioner a Preferential Lien. The Trustee in Bankruptcy filed his Petition for Review to the District Court. The District Judge reversed the order of the Referee allowing the claimant a Preferential Lien and directed that the Petitioner's claim be allowed as a general claim against the estate.

There are two questions:

1. Was there a trust relationship between the bankrupt and its employees?

2. Assuming the existence of the trust relationship between the bankrupt and its employes, can the trust fund be traced and identified?

Maurice Paradise, As Trustee.

[File endorsement omitted.]

MEMO RE ORDER GRANTING LEAVE TO APPEAL

And on the same day, to-wit: On the twenty-seventh day of April, 1935, an Order was entered in cause No. 5498, Granting Leave to Appeal, which said Order is not copied here as the same appears on pages 26 & 27 of the printed record in this cause, certified herewith.

[fol. 34] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 5498

[Title omitted]

APPEARANCE OF COUNSEL—Filed April 27, 1935

The Clerk will enter my appearance as counsel for Appellant.

Stanford Clinton, 134 North La Salle St., Chicago, Illinois.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 5498

[Title omitted]

PETITION TO CONSOLIDATE—Filed April 30, 1935

Your Petitioner, Maurice Paradise, as Trustee, respectfully represents unto this Honorable Court that he is the appellant in the above entitled cause and that he is also the [fol. 35] appellant in the cause bearing Case No. 5499, which is also pending in this court.

Your Petitioner further represents that this cause is identical in respect to parties, subject matter and the relief sought as in the cause bearing Case No. 5499; that both of said appeals seek to review the identical order entered by the District Court on the 28th day of March, A. D. 1935; that your petitioner has prosecuted these two appeals due to the fact that he was in doubt as to whether the appeal should be taken under Section 47 or Section 48, Title 11, of the United States Code.

Your Petitioner further represents that it will greatly simplify, and expedite said appeals, if this cause be consolidated with Case No. 5499.

Wherefore, your Petitioner respectfully prays this Honorable Court for an order consolidating this cause with Case No. 5499 and that the record in Cause No. 5499 be treated as the record in this cause; that said causes, as consolidated, shall proceed as though they were one appeal and the orders, findings or judgments of this court shall be binding upon the parties, and have the same effect, as though said orders and judgments were separately entered in each of said causes.

And your Petitioner will every pray, etc.

Maurice Paradise, as Trustee, by Stanford Clinton,
His duly authorized agent.

Duly sworn to by Stanford Clinton. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 36] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 5498

[Title omitted]

STIPULATION TO CONSOLIDATE—Filed April 30, 1935

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that an order be entered herein consolidating this cause with the cause pending in this court bearing Case No. 5499; that said causes, as consolidated, shall proceed as though they were one and the same appeal; that the record heretofore filed in Cause No. 5499 shall be treated as the record in said consolidated causes and shall be binding upon the parties, as though said record was filed separately in each of said causes and that all the orders, findings or judgments of the court which shall hereafter be entered in said causes, as consolidated, shall be binding upon the parties and be of the same effect as though said orders, findings or judgments were separately entered in said causes.

A. L. Schapiro, Attorney for Frank McKey, Trustee in Bankruptcy, Respondent-Appellee. Stanford Clinton, Pritzker & Pritzker, Attorneys for Maurice Paradise, as Trustee, Petitioner-Appellant.

[File endorsement omitted.]

[fol. 37] MEMO RE ORDER CONSOLIDATING CAUSES

And on the same day, to-wit: On the thirtieth day of April, 1935, an Order was entered Consolidating Cause No. 5498 with Cause No. 5499, which said Order is not copied here, as the same appears on pages 27 & 28 of the printed record in this cause, certified herewith.

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 5498-5499

[Title omitted]

APPEARANCE OF COUNSEL—Filed May 1, 1935

The Clerk will enter my appearance as counsel for Appellee.

A. L. Schapiro, 33 So. Clark St., Chicago, Illinois.

[File endorsement omitted.]

[fol. 38] Minute entry of argument and submission, Oct. 8, 1935, omitted in printing.

[fol. 39] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Consolidated Nos. 5498-5499

[Title omitted]

STIPULATION RE CLAIM OF APPELLANT—Filed Nov. 25, 1935

It Is Hereby Stipulated and Agreed by and between Maurice Paradise, as Trustee, appellant, and Frank M. McKey, Trustee in Bankruptcy, appellee, the parties to this appeal, by their respective attorneys, that no part of the $14,607.51 claimed by the appellant represents wages earned within three months before the date of the commencement of court proceedings.

Stanford Clinton, Attorney for Appellant. A. L. Schapiro, Attorney for Appellee.

[File endorsement omitted.]

[fol. 40] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, OCTOBER TERM, 1935, OCTOBER SESSION, 1935

Nos. 5498 and 5499

In the Matter of GRIGSBY-GRUNOW, INC., Bankrupt

MAURICE PARADISE, as Trustee, Appellant,

vs.

FRANK M. MCKEY, Trustee in Bankruptcy, Appellee

Appeals from the District Court of the United States for the Northern District of Illinois, Eastern Division

Before Evans and Sparks, Circuit Judges, and Briggle, District Judge

OPINION—Filed December 7, 1935

EVANS, Circuit Judge:

These appeals were taken from an order entered in the Grigsby-Grunow bankruptcy proceedings which disallowed preference to a claim presented by the trustee of an employees' welfare association, appellant herein. Bankrupt, prior to its adjudication, employed three thousand persons. They all belonged to an association which had for its objective the development of harmonious relations between bankrupt and its employees and the providing of accident and health insurance for the latter. Bankrupt charged each employee a membership fee of one dollar and deducted twenty-five cents each week from the employee's wage. These sums, after certain expense deductions, were turned over to the association to be invested solely in United States Government bonds and to be used for the aforementioned purposes. Bankrupt deducted the twenty-five cents per week from the wages of each of its employees and charged itself with the said amount and at the same time turned the money over to the welfare association. This practice was [fol. 41] followed for some time, but, after February 4, 1933, it neglected to pay all of the funds which it deducted from the wages of its employees to the treasury of the wel-

fare association. When the petition in bankruptcy was filed, it held $14,607.51 of such moneys.

The referee to whom the matter was referred made findings upon which he allowed the claim as a preferential lien against the assets of the estate. On review, the District Court reversed this order and appellant's claim was allowed as a general, but not as a preferred claim.

We quote from the findings of the referee, which are not attacked:

"On February 4, 1933 and prior thereto, the bankrupt maintained in connection with its business, an unincorporated organization known as the 'Majestic Employees Welfare Association,' which had been formerly known as the 'Majestic Employees Welfare and Athletic League.' The Association's purpose was to provide life, health and accident insurance for the benefit of the employees of the bankrupt and their dependents. The Association was governed by its own officers and directorate and maintained its own account in the First National Bank of Chicago. The funds of the Association were invested exclusively in obligations of the United States Government and the earnings and increment of these investments were used for the insurance benefits contemplated by the Association's constitution and by-laws.

"The membership of the Association was comprised exclusively of employees who had been employed for thirty days or more and who had paid the initial fee of $1.00 to the treasury of the Association. The initial fee was automatically deducted by the bankrupt from the amount due as salary or wages of each employee, employed for the required period. In addition to the initial fee there were weekly dues of 25c per week, which were likewise automatically deducted by the bankrupt from the amount due each member as salary or wages.

"Prior to February 4, 1933, the bankrupt regularly paid the Association by check which was deposited in its treasury, the accumulations of each payroll deduction, less deductions for expenses of the Association paid by the bankrupt. Commencing with February 4, 1933, however, the bankrupt began to fall in arrears, and from that time until November 24, 1933, when the Receivers in Equity were [fol. 42] appointed for the bankrupt, there was always a balance to the credit of the Association, which it had not

paid to the Association. On November 24, 1933 said balance was in the sum of $14,607.51. The deductions of 25c per week, including deduction for the initial fee, were made by charging the employee's account on the payroll records of the bankrupt and crediting the aggregate of all such deductions to the account of the Majestic Employees Welfare Association on the books of the bankrupt. No actual money was taken from the pay envelopes of the employees and deposited in any account of the bankrupt, but to the contrary the matter was handled as a mere bookkeeping entry and at no time did the Grigsby-Grunow Company segregate any money due the Majestic Employees Welfare Association or deposit any money in any separate trust account or bank account.

"On or about August 12, 1933, the Majestic Employees Welfare Association was formally dissolved and disbanded. • • •

"After setting up a fund of some $2,750.00 to cover certain contingent obligations of the Association, all the other assets were conveyed, by apt resolution, to the Majestic Works Council. The Works Council, like the Association, was an unincorporated organization in which the bankrupt and its employees had equal representation. All employees of the bankrupt were members of the Works Council. The Works Council had for its objective harmonious relations between the bankrupt and its employees and conferred numerous benefits upon the employees.

"• • • A claim was filed in the equity receivership case by Maurice Paradise, as Trustee, the petitioner herein, for the payment of $14,607.51 to the Works Council. However, the moneys were never paid. • • •

"The practice of the bankrupt was to deposit all of its incoming revenue in its general bank account, from which it would from time to time withdraw moneys and establish various special accounts. The bankrupt was accustomed to withdraw from its general account or special accounts as the convenience of the situation required, and the payroll was drawn from the various accounts, both general and special, indiscriminately."

[fol. 43] Whether a constructive trust was created in appellant's favor must be determined by the legal effect of

the bankrupt's acts. The following, taken from the stipulated facts, is well-nigh controlling:

"* * * In addition to the initial fee there were weekly dues of 25¢ per week, which were likewise automatically deducted by the bankrupt from the amount due each member as salary * * *.

"Prior to February 4, 1933, the bankrupt regularly paid the Association by check which was deposited in its treasury, the accumulations of each payroll deduction, less deductions for expenses of the Association paid by the bankrupt. Commencing with February 4, 1933, however, the bankrupt began to fall in arrears, and from that time until November 24, 1933, when the Receivers in Equity were appointed for the bankrupt, there was always a balance to the credit of the Association, which it had not paid to the Association. On November 24, 1933, said balance was in the sum of $14,607.51. The deductions of 25¢ per week, including deduction for the initial fee, were made by charging the employees' account on the payroll records of the bankrupt and crediting the aggregate of all such deductions to the account of the Majestic Employees Welfare Association *on the books of the bankrupt.*"

Such transactions, we think, resulted in the creation of a trust, a constructive trust, a trust ex maleficio, which was fastened upon the bankrupt irrespective of its intention. When it deducted the twenty-five cents per week and the one dollar initiation fee, it was under obligation to turn the same over to the Majestic Employees Welfare Association. This it did for several years. But, with failure and bankruptcy confronting it, resort was had, as is so frequently the case, to subterfuge—to an attempt to despoil or dispossess those whose numbers were many and whose individual interests were small. Instead of turning over to the welfare association the money deducted from the employees' wages, the bankrupt converted it to its own use. It credited itself with the payment of the amount and yet retained the said sum in its own treasury. This was a conversion.

The turning point in the case is the transaction whereby bankrupt, indebted to individual employees for wages, took the same and satisfied its indebtedness to them and then [fol. 44] failed to turn the money over to the beneficiary.

Bankrupt's right to credit itself with the unpaid wages was dependent upon its payment of said sum to the welfare association.

What bankrupt did was to take the money, the amount of which was the unpaid wages of its employees, from one pocket and transfer the same money to another pocket, and to announce, in legal effect, that in this sum it was now indebted to the welfare association. It should have paid it to the association. It was guilty of conversion when it did not do so. The legal effect of such transaction was to make it a trustee ex maleficio. Bankrupt did not notify either party (employees or welfare association) of the transaction. It is true there was little or no difference in the two entities, the employees and the welfare association. But there was some—sufficient to make them separate entities. Only through accident, ill health or some other cause would an employee share in the benefits. For all practical, as well as legal consequences, therefore, the welfare association was an entity distinct from the employees whose wages created the fund out of which the welfare association paid its benefits.

Such a trust so cerated (a constructive trust, a trust ex maleficio) will not fall though other dollars may take the place of the original ones received when the employees made their contribution to the fund. "Dollars are fungibles and any one of them will be accepted as a substitute for another." Jennings v. U. S. F. & G. Co., 294 U. S. 216, 224.

The record shows there were at all times sufficient moneys in the bank deposits of the bankrupt to pay the amount due the welfare association.

It seems we have a case where A, the employees of B, consented to B's taking a certain amount each week from their wages and turning it over to a charitable organization, C, for the purpose of creating a fund to be managed and distributed by C among its ailing members. B deducted the money which A agreed might be deducted. After deduction, however, instead of B's delivering the money to C, B kept the money.

A somewhat similar situation is discussed in Adams v. Champion, 294 U. S. 231, 238, where it is said:

"* * * By a process of analysis a unitary transaction, the cancellation of a debt to a depositor, is treated as if split up into two parts, a fictitious withdrawal by the depositor

of coin or other currency, and its return to the bank to be applied upon the purchase. The money so returned is then [fol. 45] subjected to a trust and though mingled with other money is viewed as retaining its identity so long as any portion of the fund is discovered to be intact. *These fictions and presumptions may serve well enough in their application to one whose act is against equity and conscience at the time of its commission.* They may be implements of justice in cases of theft or actual fraud. So, at least, we now assume."

In the instant case, however, unlike that discussed in Adams v. Champion, supra, or in Jennings v. U. S. F. & G. Co., supra, there was not even the "unitary transaction." We do not have two parties dealing with one another—a depositor and a bank—out of whose transactions an implied relationship is assumed, but we have employees and an employer dealing with each other, the former creating a fund for the benefit of C, a third party. The employer's indebtedness to the employees was satisfied only upon employer's delivering the money to the third party, C. In carrying out this transaction employer credited itself, as against the employees, with having made the payment to C. As a matter of fact it did not make the payment to C, but converted the money to its own use. Under these circumstances we see no escape from the conclusion that a constructive trust, a trust ex maleficio, was created. The employer was a wrongdoer, a converter, from the moment it credited itself in full for payment of the employees' wages.

Some of the decisions upon which appellee relies must be distinguished on the ground that the party sought to be held as trustee was a national bank. Now, it is apparent that between a depositor and a bank, a well-nigh universal experience has resulted in the recognition of the status of the depositor and the relationship that exists between depositor and the bank. It is that of debtor and creditor. National bank statutes and the regulations of the National Banking Department governing the liquidation of insolvent banks are confirmatory of this relationship. Jennings v. U. S. F. & G. Co., supra; Adams v. Champion, supra; Old Company's Lehigh, Inc. v. Meeker, Receiver, et al., 294 U. S. 227.

A depositor who draws a check in favor of a bank with instructions to buy a security understands the position he

occupies. It is that of a creditor until the security is possessed by the bank. If a different status is desired, special instructions and deposits are necessary. Jennings v. U. S. [fol. 46] F. & G. Co., supra; Adams v. Champion, supra. If a depositor gives the bank a check against his account, with which to buy a bond, it is well understood that the debtor-creditor relationship extends as to this, as well as to the deposit transactions. Custom has given character to the transaction.

In the case of an employee who is seeking, or who has been compelled by his employer, to create a fund out of which sickness benefits may be paid to ailing employees, quite a different understanding arises. Unlike the bank depositor's situation, the employee has nothing to do with the withholding of his wages or its payment to the beneficiary company. He does not know of its payment or of its conversion, if any there be. He relies on his employer. He knows that his employer has the authority to withhold part of his wages and that he has done so. He also knows that the deduction of part of his wages is permissible only if the employer turns the same over to the welfare association. He does not know whether this has been done. There is no understanding—no implied agreement that the employer may hold the money indefinitely or otherwise and become a debtor of the welfare association. A contrary understanding exists, namely, that the employer must turn the money over to the welfare association immediately upon its deduction from the employee's wages. Failure to do so makes it a wrongdoer. Against such a wrongdoer and to protect the contributor, equity fastens a trust upon the transgressor and holds him as a trustee ex maleficio.

Such a trust, equity will follow even though there has been a commingling of the trust fund with private accounts. Jennings v. U. S. F. & G. Co., 294 U. S. 216, 226; Knatchbull v. Hallett, 13 Ch. Div. 696; Gorman v. Littlefield, 229 U. S. 19; Standard Oil Co. v. Hawkins, 74 F. 395.

It cannot be doubted, it is true, but that the wrongful action of the bankrupt might have been ratified by the welfare association. The latter's right against the bankrupt for conversion might have been waived and the bankrupt's action might have been ratified. In such case the relation of debtor and creditor and not that of trustee and cestui que trust would have arisen. We find nothing in the record

before us however that would support a finding that the bankrupt's retention of the money was agreed to or acquiesced in by the welfare association. A contrary deduction is unavoidable. The articles of the welfare association called for the investment of all of its funds in Government bonds. This negatived any possibility that the same might [fol. 47] be loaned to employer. It also appears that the welfare association demanded payment of the sum due it. Neither the employees nor the welfare association knew the facts. The employees did not know whether the money had been turned over to the welfare association or not. The welfare association did not know how much had been deducted from the employees' wages. It is elementary that no waiver of rights or ratification of wrongful actions can occur without knowledge of the facts.

Another approach to these facts and another syllogism lead to the same conclusion.

From acts and words, as well as from express agreement, the status of trustee may be created. Bogert on Trusts, Volume I, Section 45, page 197, states the rule as follows:

"The relationship of the parties, followed by acts affecting title and possession, may lead a court to imply a trust intent as actually existing and as having been expressed, although no words referring to a trust or trustee have been spoken or reduced to writing. In the creation of trusts settlors have never been handicapped by formalism. They have not been required to express their intention to create a trust in set phrases or words. * * *"

In the instant case the parties did not use the words "trust," "trustee," and "cestui que trust," but they dealt with one another in such a way, with respect to moneys which the employer held for the employees and later for the welfare association as to point directly to the existence of an implied trust. That is to say, the parties understood that the employer was to pay the twenty-five cents per month deducted from the employees' wages to the welfare association. Until the payment was made, however, it was to hold the money in trust for such welfare association. The obligation of the trustee terminated when payment was made.

This conclusion seems to be an irresistible one resulting from the consideration of the agreed facts and acts and the

necessary inferences which arose therefrom. The intention of the parties governs. Agreements informally reached, the details of which are frequently established by action, at times leaves the question of intent somewhat in doubt. At other times the object of the transaction and the acts of the parties speak even more persuasively than oral testimony and almost as effectively as formal but unintelligently prepared written agreements. Considering the purpose of [fol. 48] this agreement and all of the surrounding circumstances, it seems to us that the parties intended the wages withheld by the employer should be held by it as trustee until payment was made to the welfare association.

The decree is reversed with directions to enter one in accordance with the views here expressed.

[File endorsement omitted.]

In United States Circuit Court of Appeals

In the Matter of Grigsby-Grunow, Inc., Bankrupt

5498

Maurice Paradise, as Trustee,

vs.

Frank M. McKey, Trustee in Bankruptcy

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

Decree—December 7, 1935

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On Consideration Whereof: It is now here ordered, adjudged and decreed by this court that the Order or Decree of the said District Court in this cause appealed from be, and the same is hereby reversed with costs, and that this cause be, and the same is hereby remanded to the said Dis-

trict Court with directions to enter a decree in accordance with the views expressed in the opinion of this court.

[fols. 49 & 50] In United States Circuit Court of Appeals

In the Matter of Grigsby-Grunow, Inc., Bankrupt

5499

Maurice Paradise, as Trustee,

vs.

Frank M. McKey, Trustee in Bankruptcy

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

Decree—December 7, 1935

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On Consideration Whereof: It is now here ordered, adjudged and decreed by this court that the Order or Decree of the said District Court in this cause appealed from be, and the same is hereby reversed with costs; and that this cause be, and the same is hereby remanded to the said District Court with directions to enter a decree in accordance with the views expressed in the opinion of this court.

[fol. 51] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 52] Supreme Court of the United States, October Term, 1935

No. 785

Order Allowing Certiorari—Filed April 6, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is

granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 53] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1935

No. 786

ORDER ALLOWING CERTIORARI—Filed April 6, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File Nos. 40,339, 40, 340. U. S. Circuit Court of Appeals, Seventh Circuit. Term No. 785. Frank M. McKey, Trustee in Bankruptcy, petitioner vs. Maurice Paradise, as Trustee. Term No. 786. Frank M. McKey, Trustee in Bankruptcy, petitioner, vs. Maurice Paradise, as Trustee. Petition for writs of certiorari and exhibit thereto. Filed March 4, 1936. Term Nos. 785, O. T., 1935, 786, O. T., 1935.